

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

FIRST APPEAL No 54 of 1980

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

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CHANDRAKANT CHUNILAL SHAH

Versus

GOVINDJI DOLAJI

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Appearance:

MR JR NANAVATI for appellants

MR SR DIVETIA for respondent No. 1

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CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision: 29/09/98

ORAL JUDGEMENT

#. This First Appeal by original plaintiffs is directed against the judgment and decree of the Judge, City Civil court No.12, Ahmedabad, dated 13th July 1979 in Civil Suit No.3780/75, under which the suit filed by the plaintiffs-appellants for recovery of possession of suit premises, future mesne profits and costs thereof has been dismissed.

#. The facts of the case, in brief, are that the plaintiffs are joint owners of block No.16 bearing Survey No.481-B-17 admeasuring 46 sq.yds. in Nagori Shala, Ratanpole in Kalupur ward in Ahmedabad, which has been purchased by them for Rs.15,000/= from its owners Suvarnkumar Ambalal and Nipunkumar Ambalal by registered sale deed dated 25.7.75. This premises consists of ground floor and two upper floors. The ground floor consisting of two rooms (hereinafter referred to as suit premises) which were in occupation of Bai Teja Prajapati as a tenant since her predecessor-in-title. After her death, her daughter Bai Gauri was in occupation of it as statutory tenant and she was residing with her mother in the premises at the time of her death. Bai Gauri had only one daughter named Shanta, who had been married and she resides with her husband and children at Deesa, District: Banas Kantha. The defendant-respondent is the son of Bai Shanta. He was residing with his parents and other family members at Deesa and he never resided with Bai Gauri in the suit premises during her life time. Bai Gauri was in occupation of the suit premises till her death on 9.6.75. After death of Bai Gauri, the defendant-respondent, being her grand-son came to stay in the sit premises for performance of her after death ceremonies and since then what the plaintiffs have alleged, unlawfully took possession of the suit premises. It is further case of the plaintiff that the defendant-respondent had promised to vacate the suit premises but he did not vacate the same. The plaintiff had never accepted him as a tenant either by themselves or by their predecessor-in-title nor any tenancy rights does devolve to him in respect of suit premises in accordance with law. His possession of suit premises was not as a tenant but as a trespasser. The plaintiff served the defendant-respondent with a notice dated 30th July 1975 and thereby directed him to deliver vacant possession of suit premises. However, the defendant-respondent did not comply with it and instead of vacating the suit premises, gave reply thereto on 7.8.75. The plaintiff filed present suit for recovery of possession of the suit premises against the defendant-respondent and future mesne profit at the rate of Rs.25/= p.m. from the date of suit til possession of suit premises is delivered and costs of the suit.

#. The defendant-respondent, on receipt of summons of the suit resisted the same by filing written statement. He has shown ignorance of the fact that the plaintiffs have purchased the suit premises. He admitted that Bai Teja was in occupation of the suit premises as a tenant and after her death, her daughter Bai Gauri became its

tenant as she was residing with her mother in the premises, but it is denied that Bai Gauri became a statutory tenant and according to him she was in occupation of the premises as lawful tenant. It is admitted by defendant-respondent that his mother Bai Shanta is the daughter of Bai Gauri and she is the only heir of Bai Gauri. The defendant-respondent has admitted that Bai Shanta, his mother resides with her husband, his father, at Deesa. It is denied in written statement that he was residing with his parents and other family members at Deesa till death of Bai Gauri and he never resided with Bai Gauri in the suit premises during her life time. The defendant-respondent has come up with the case that he had settled in Ahmedabad since last couple of years and is carrying on his business at Ahmedabad and as Bai Gauri was his maternal grant mother, he was residing with her in the suit premises till her death and even also thereafter. Bai Gauri was not keeping good health prior to her death and so the defendant-respondent was required to attend her and to secure medicines and other medical help for her and his mother Bai Shanta often used to visit Ahmedabad to look after Bai Gauri and she also used to put up and stay with her mother in the suit premises. So in sum and substance, the defendant-respondent pleaded defence that he is in possession of suit premises as tenant and he was residing with her maternal grand mother as member of her family at the time of her death. He pleaded the Will executed by Bai Gauri thereby bequeathing her property to the defendant-respondent and other member of the family and by virtue of that registered will he acquired tenancy rights in the suit premises in accordance with law and he claimed himself to be a lawful tenant of the suit premises. Plea has been taken that the Civil Court has no jurisdiction to entertain the suit as it pertains to dispute of tenant and landlord regarding tenancy. On the basis of pleadings of the parties, the learned trial Court framed as many as five issues in the suit which are as under:

1. Whether the plaintiffs prove that the defendant is in unlawful possession of the suit premises?
2. Whether the defendant proves that he is in possession of the suit premises as a tenant thereof?
3. Whether this Court has no jurisdiction to entertain and hear this suit?
4. Whether the plaintiffs are entitled to

the reliefs as prayed for?

5. What order and decree?

#. After recording evidence of the parties, the learned trial Court has held that the plaintiff has failed to prove that the defendant is in unlawful possession of suit premises. The learned trial Court found possession of the defendant-respondent in the suit premises as tenant thereof. The Court has further held that it has jurisdiction to entertain and hear the suit. As a result of these findings, the plaintiff-appellant was held to be not entitled for grant of any relief. Hence this appeal before this Court.

#. The learned counsel for the appellant contended that the learned trial Court has recorded finding of fact on appreciation of evidence produced by the parties that the defendant-respondent occupied the suit premises on 9.6.75 and not prior to that date. It is next contended that the learned trial Court has not accepted the case of the defendant-respondent that he was residing with his maternal grand mother Bai Gauri in the suit premises since 1973. In the presence of this finding, the learned counsel for the appellant contended that the tenancy rights do not devolve on the defendant-respondent. Carrying this contention further, the learned counsel for the appellant contended that even if it is taken to be a case where Bai Gauri was having a contractual tenancy rights in the premises, still after her death these tenancy rights are not inherited by defendant-respondent nor under the Will tenancy rights devolve upon him as this being a case of tenancy the devolution of tenancy rights after death of the tenant will only on those persons who are in fact residing in a case of residential premises with her during her lifetime and continuously residing till her death. In view of the finding as aforesaid recorded by the learned trial Court, the defendant-respondent was not residing prior to and till death of Bai Gauri with her and he could not have been taken to be a tenant in the suit premises. Once tenancy rights are not devolved upon the defendant-respondent either under Hindu Succession Act by succession or by testamentary disposition of late Bai Gauri, his status was only of a trespasser and the learned trial Court should have passed a decree for delivery of possession in favour of plaintiff-appellant. In support of this contention, the learned counsel for the appellant placed reliance on the Full Bench decision of this Court in the case of Babubhai Ratilal & Ors. v. Shah Bharatkumar, reported in 1980 (Vol.21) GLR 103.

#. On the other hand, the learned counsel for defendant-respondent contended that it is a case of contractual tenancy and devolution of the same on the death of a tenant to his successor will go by common law and not by Bombay Rent Control Act. In this case, it is undisputed fact that the defendant-respondent is the grand son of late Bai Gauri who was a contractual tenant in the suit premises and on her death, he succeeded to those rights and he became tenant in the suit premises. Carrying this contention further, the learned counsel for defendant-respondent urged that otherwise also, under the Will executed by late Bai Gauri, the defendant-respondent became a tenant in the suit premises. It has next been contended that the decision of the Full Bench of this Court is clearly distinguishable and is not applicable to the facts of the present case. There, the case had arisen from a suit under Rent Control Act and in the given facts of that case, Full Bench of this Court has taken a view that tenancy will devolve on the successors of the tenant on his/her death in accordance with provisions of the Rent Control Act and not under the common law. Lastly, it is contended that otherwise also, whatever observations made and decisions given by the Full Bench of this Court in respect of devolution of contractual right on the death of tenant is only obiter dicta. The learned counsel for respondent placed reliance on two decisions of this Court in support of his contentions but during the course of arguments he fairly conceded that these two decisions are in point of time earlier to the decision of Full Bench decision of this Court in the case of Babubhai Ratilal & Ors. v. Shah Bharatkumar, (supra).

#. I have given my thoughtful considerations to the submissions made by learned counsel for the parties.

#. The finding of facts recorded by the Court below which are not challenged by learned counsel for the parties are as follows:

(a) So these documents clearly reveal that the defendant was not residing in the premises along with Bai Gauri during the period from August 1971 till January 1975 and she alone was residing in the premises;

(b) in view of the matter, I am not inclined to accept the oral evidence of the defendant and his witnesses on the point that the defendant was residing with his grand mother in the premises

since 1973;

(c) I have therefore no hesitation in accepting their evidence and when their evidence is accepted, then the obvious conclusion is that the defendant was not residing in the premises alongwith his grandmother since year 1973 but he occupied the same only after the death of Bai Gauri on 9.6.75 as he being her grand son was required to perform her after death ceremonies. So the result of aforesaid discussion is that the plaintiffs have proved that the defendant occupied the premises on 9.6.75 and not prior to that date, while the defendant has failed to prove that he was residing with his maternal grand mother Bai Gauri in the premises since 1973;

(d) In that view of the matter, my conclusion is that Bai Gauri also continued to occupy the premises as contractual tenant and not as a statutory tenant till her death on 9.6.75.

(e) So the result of the aforesaid discussion is that the plaintiffs have failed to appreciate that the defendant is in unlawful possession of the premises while the defendant has proved that he is in possession of the premises not as a tenant but as a member of tenant's family.

After recording these findings of fact, while deciding issue No.4, the learned trial Court has held that the plaintiff is not entitled to recover possession of the premises from the defendant because he is in possession of the premises as a member of the tenant's family and his possession is not unlawful. It is further held that in that case the plaintiffs will have to bring their case under any of the provisions of Sections 12 and 13 of the Bombay Rent Control Act in order to recover possession of the premises from the defendant and for that purpose, appropriate forum would be the Small Causes Court at Ahmedabad. Similarly, the Court further said that the plaintiffs would not be entitled to recover mesne profits from the defendant in the suit as they will be entitled to contractual or standard rent in respect of premises.

#. The question which falls for consideration of this Court is whether devolution or succession to the contractual tenancy on the death of tenant is to be governed by the rule of succession as provided under the Bombay Rent Control Act or by general rule of succession. It is the case of the plaintiffs-respondent, relying on

the decision of the Full Bench of this Court in the case of Babubhai Ratilal & Ors. v. Shah Bharatkumar (supra) that this matter is squarely covered under that decision. The Full Bench in that case held that after the Rent Control Act, under which the tenancy rights in the premises are to be regulated, there is no distinction in between the rule of succession or survival in contractual tenancy or statutory tenancy. The succession or devolution of the right of tenancy and precisely in this case contractual tenancy on the death of Bai Guari qua the defendant-respondent shall be governed by the provisions of the Rent Control Act and as the case of the defendant-respondent does not fall under the said provisions his possession of the suit property was only that of trespasser and the learned trial Court should have decreed the suit.

##. It is true that the learned counsel for the defendants-respondents is not accepting this position but it is also equally true that the decision on which reliance has been placed by him are in point of time earlier to the decision of the Full Bench of this Court.

##. Section 5, Clause 11 of the Bombay Rents, Hotel & Lodging House Rates Control Act, 1947 (hereinafter referred to as the "Act 1947"), defines 'tenant' as under:

"tenant" means any person by whom or on whose account rent is payable for any premises and includes --

(a) such sub-tenants and other persons as have derived title under a tenant [before the commencement of the Bombay Rents, Hotel & Lodging House Rates Control (Amendment) Ordinance, 1959];

(a) any person to whom interest in premises has been transferred under the proviso to sub-section (1) of Section 15;

(b) any person remaining after the determination of the lease, in possession, with or without the assent of the landlord, of the premises leased to such person or his predecessor who has derived title [before the commencement of the Bombay rents, Hotel & Lodging House Rates Control (Amendment) Ordinance, 1959];

(c) (i) in relation to premises let for residence, any member of the tenant's family residing with the tenant at the time of, or within three months immediately preceding, the death of the tenant as may be decided in default of agreement by the Court, and

(ii) in relation to premises let for business, trade or storage, any member of the tenant's family carrying on business, trade or storage with the tenant in the said premises at the time of the death of the tenant as may continue, after his death, to carry on the business, trade or storage as the case may be, in the said premises and as may be decided in default of agreement by the Court.

##. In the case of Babubhai @ Jayantilal Kalyanbhai & Ors. v. Shah Bharatkumar Ratilal & Ors. (supra) the Full Bench of this Court observed that so far as the restricted area under the State Rent Act is concerned, distinction between a contractual tenancy and a statutory tenancy is done away with and the extent of the tenancy under the State Rent Control Acts would be the same irrespective of the fact whether the contractual tenancy subsists or is terminated. It is further observed that if there is some estate or interest in a tenancy under the Bombay Rent Control Act which will be heritable on the demise of the original tenant. If that is so, the conclusion is inescapable that all the heirs of an original deceased tenant would be entitled to succeed to that estate or interest which is protected by the Rent Act till the jural relationship of landlord and tenant is snapped by an order or decree of eviction made under the relevant provisions governing the question of eviction. Considering the Division Bench decision of this Court in the case of Nanumal Rajumal v. Lilaram Vensimal & Anr. 18 GLR 858, the Full Bench of this Court observed that the Division Bench of this Court in the case aforesaid proceeded on the legal position which was then prevailing that statutory tenancy was not heritable and therefore the Legislature had to step in to provide for the void that may arise in the field of the rights of the heirs to continue in possession after the demise of a statutory tenant. The Court said that the Division Bench of this Court therefore observed that since the protection under the Rent Control Act cannot be extended to all the heirs inheriting the lease hold rights irrespective of their



need, the Legislature stepped in and provided a special mode of succession to the tenancy rights or to lease hold rights to those who were in need of it by limiting it to the members of the tenant's family residing with him without deciding the rank inter se. It is further said that the basis of protection under Section 5(11)(c) of the Bombay Rent Act, according to the Division Bench of this Court was, whether the person claiming right is dependant of the deceased statutory tenant and to such classes of persons the tenancy rights would devolve not in the strict sense of succession but in the sense of right to occupy and to possession on the obligation of paying rent and enjoy protection against eviction except on the grounds mentioned in the protective Acts. The Full Bench then in unequivocal terms said, "the special mode of devolution enacted in Section 5(11)(c) to the exclusion of general law of inheritance applies also in case of contractual tenancy" (emphasis supplied).

##. In this context, the Court said that till qualified class of persons as envisaged in sec.5(11)(c) is available, any one of them in the manner provided therein would be entitled to transmission of tenancy and on his death any one of his family staying with him would be further entitled to transmit tenancy in the same way. Referring to two decisions of Hon'ble Supreme Court the Court said, "we are afraid that this exposition of law and the premises thereof would not hold the field in view of the aforesaid decision of the Supreme Court in Damadilal's case read with that in Dhanpal's case. If there does not exist a well recognized distinction between a contractual tenancy and a statutory tenancy governed by the Rent Control Legislation, and if the difference is erased to such an extent that no apparent distinction is visible and that is the position indeed, in view of the two decisions of the Supreme Court, the view of the Division Bench in Nanumal's case that there is a special mode of succession under sec.5(11)(c) of the Bombay Rent Act cannot be affirmed since the very premise of the decision of the Full Bench of the Supreme Court in Dhanpal's case is that the law of contract and transfer of property should not be incorporated in that restricted area where the Rent Acts operate particularly having regard to the definition of word "tenant" in almost all the Rent Acts that a person continuing in occupation with or without the assent of landlord after determination of the contractual tenancy is for all intents and purposes a tenant entitled to all the rights and subject to all the obligations under the relevant Rent Act. From this decision of the Full Bench of this Court, now a distinction which is sought to be made out in some of the

earlier decisions of this Court is based on two decisions of the Hon'ble Supreme Court and now as the relation and obligation of the tenant and landlord are to be regulated under the Rent Act, the conception of contractual tenancy or a statutory tenancy is no more be given effect to. The provisions of the Contract Act or the Transfer of Property Act are not strictly applicable to the right and respective obligations of tenant and landlord, which are governed by the Rent Control Act. Prior to the decision of the Hon'ble Supreme Court in the case of Dhanpal, there was a view that the Transfer of Property Act is applicable to this tenancy also, but that view now no more survives and it is made clear that these provisions are not taken to be applicable in the matter of tenancy rights under the Rent Control Act. "Tenant" has been defined in the Rent Control Act. Protection has been given to the tenant and irrespective of what are the rights available to the landlord under the Contract Act or Transfer of Property Act against the tenant on the basis of those rights, or some agreement or other contract, the landlord has no right to evict the tenant from the premises unless a legally protected umbrella as provided to him against his eviction from the premises is removed. So only in a case where the landlord establishes to the satisfaction of the court that one of the grounds as provided for eviction of the tenant from the tenanted premises is made out, irrespective of the provisions of the Transfer of Property Act or Contract Act or agreement or some other contractual obligation between the landlord and the tenant, no decree of eviction can be passed by the Courts. In this case, on the facts on which there is no dispute, the case of respondent does not fall under Section 5(11)(c) of the Rent Control Act and he cannot be taken to be a tenant in the suit premises. So the suit filed by the landlord was the only remedy and the learned trial Court has committed serious illegality in not decreeing the same. It is not the case where the respondent has any protection under the Rent Control Act. There was no relationship of tenant and landlord in between the parties and the learned trial Court has committed illegality in relegating the plaintiff-appellant for eviction of the respondent by filing a suit for eviction under the provisions of the Rent Control Act.

##. In the result, this Appeal succeeds and the same is allowed. The judgment and decree dated 13.7.1979 passed in Civil Suit No.3780 of 1975 of the plaintiffs-appellants, by learned Judge, City Civil Court No.12, Ahmedabad, is quashed and set aside and their suit for recovery of possession of suit premises with

future mesne profits is decreed with costs throughout.

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